

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREEMAN EUGENE FRANKS,

Defendant-Appellant.

---

UNPUBLISHED

September 20, 2002

No. 229127

St. Clair Circuit Court

LC No. 99-001211-FH

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). He was sentenced as a third habitual offender, MCL 769.11, to a term of two to forty years' imprisonment. He appeals as of right. We affirm.

Initially, defendant argues that the trial court abused its discretion by denying his motion for a mistrial after the key prosecution witness improperly testified regarding other contacts and purchases of narcotics. Defendant asserts that this testimony constituted the improper introduction of bad acts evidence inadmissible under MRE 404(b)(1), and that it allowed the jury to infer that if he sold narcotics on previous occasions, it was likely that he engaged in similar activity on the date in question. We disagree.

To be admissible under MRE 404(b)(1), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). The admissibility of bad acts evidence is within the discretion of the trial court. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

We review a trial court's decision on a motion for a mistrial for an abuse of discretion. A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to receive a fair trial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

During cross-examination, defense counsel attempted to impeach the identification of defendant as the person who sold narcotics on the night in question by establishing that the

witness, an undercover officer, had no independent recollection of the transaction because she made several purchases from other persons on that date. In response to a question regarding independent recollection, the witness testified that she recalled making a purchase from defendant, but that she had been instructed to refrain from discussing other transactions. The witness did not state that she engaged in other transactions with defendant on that date or on other dates, and, given that the witness was discussing her general activities on that date, it is likely that the jury did not specifically connect the answer to defendant. We conclude that the witness' response did not introduce improper bad acts evidence in contravention of MRE 404(b)(1). Even if we were to assume *arguendo* that the witness improperly offered bad acts evidence, we would still conclude that the trial court did not abuse its discretion by denying defendant's motion for a mistrial. Any prejudicial effect generated by the isolated response could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). Any irregularity that the response occasioned did not impair defendant's ability to receive a fair trial. *Griffin, supra*.

Defendant argues that the trial court's failure to require production of a police report and personal notes kept by the key prosecution witness denied him a fair trial and the opportunity to effectively confront his accuser. We disagree.

A defendant is entitled to request the disclosure of any police report concerning the case. MCR 6.201(B)(2). The parties have a continuing duty to disclose information subject to discovery. MCR 6.201(H). Due process requires the disclosure of evidence in the prosecutor's possession that is exculpatory and material, regardless of whether the defendant requests the disclosure. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). To establish a violation of the due process right to the disclosure of information, a defendant must show: (1) that the state possessed information favorable to him; (2) that he did not possess the evidence and could not have obtained it with reasonable diligence; (3) that the prosecutor suppressed the evidence; and (4) that if the evidence had been disclosed to him, it is reasonably probable that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the result. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).

Defendant moved for the production of and received various documents, including police reports. However, on cross-examination, the key prosecution witness revealed, evidently for the first time, that in addition to preparing a police report she kept personal notes regarding purchases she made as an undercover officer. She indicated that the notes, which were not kept as part of standard procedure, contained no details of the transactions, and that she had an independent recollection of the transaction with defendant. The witness also indicated that another report had been prepared, but that the report contained no additional information to the police report defendant received. Defendant did not demand production of the notes or the report, nor did he object to the trial court's failure to order production. Defendant's only objection was to the prosecutor's questioning the officer about her notes without having produced them, and the trial court overruled the objection. With regard to the report, defendant did not object to the failure to produce this report. Defendant has not shown that had the report and the officer's personal notes been disclosed, it is reasonably probable that the result of the proceeding would have been different. *Id.* Even if we were to assume that the trial court erred by failing to order production of these items, we would find that the error did not result in the

conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of the proceedings. Reversal is not required. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant argues that the trial court was personally prejudiced against him due to the court's characterization of him as a "menace to society" during sentencing in an unrelated case, and that the trial court's failure to disqualify itself denied him due process. We disagree.

A judge is disqualified when he or she cannot impartially hear a case, including instances in which the judge is personally biased in favor of or prejudiced against a party or an attorney. MCR 2.003(B)(1). As a general rule, a showing of actual, personal prejudice is required to disqualify a judge, and the party who asserts partiality bears the burden of overcoming the presumption of impartiality. A showing of personal prejudice usually requires that the source of the prejudice be in events or information from outside the judicial proceeding. *Cain v Dep't of Corrections*, 451 Mich 470, 495-497; 548 NW2d 210 (1996). We review the factual findings underlying a ruling on a motion for disqualification for an abuse of discretion, and the application of the law to the facts de novo. *Id.* at 503 n 38.

The entire basis for defendant's motion for disqualification was that the court was personally prejudiced against him because it made a critical remark during sentencing in another case. The fact that a judge has presided over unrelated proceedings involving a party does not, in and of itself, establish prejudice. *People v White*, 411 Mich 366, 386; 308 NW2d 128 (1981). Moreover, in denying the motion, the court stated that it had no independent memory of the sentencing hearing in the other matter, and that it was not prejudiced against defendant. Defendant has failed to overcome the presumption that the court was able to hear the case in an impartial manner. *Cain, supra* at 497.

Defendant argues that the trial court denied him a fair trial and due process by limiting his ability to cross-examine two undercover officers regarding their memories of their activities on the date in question. Defendant asserts that the undue limitation prevented him from asking questions designed to attack credibility by establishing that the officers had no independent recollection of having purchased narcotics from him on that date. We disagree.

A limitation on cross-examination that prevents a defendant from placing before the jury facts that demonstrate bias, prejudice, or lack of credibility from a prosecution witness constitutes a denial of the constitutional right of confrontation. US Const, Am VI; Const 1963, art 1, § 20. The scope of cross-examination is within the discretion of the trial court. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). A violation of the right to adequate cross-examination is subject to a harmless error analysis. *People v Kelly*, 231 Mich App 627, 644-645; 588 NW2d 480 (1998).

Defendant attempted to cross-examine the witnesses regarding details of other transactions on the date in question and on other dates to demonstrate that their inability to recall details undermined their credibility and made their identification of him unreliable. The trial court limited cross-examination regarding details of other transactions on the ground that the information was irrelevant. Defendant was not precluded from inquiring into the details of the transaction in which he was alleged to have participated, and defendant questioned the witnesses' credibility by demonstrating that they could not recall some details of that alleged transaction.

Defendant was not prohibited from developing his theory that the witnesses' identification of him as a seller of narcotics was mistaken. No abuse of discretion occurred. *Canter, supra*.

Defendant argues that the trial court's failure to give preliminary jury instructions before testimony commenced as required by MCR 2.516(B)(1) denied him a fair trial and due process. He asserts that the error was structural and requires automatic reversal even absent an objection. We disagree.

A trial court must instruct the jury to allow it to correctly decide the case. *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998). We review claims of instructional error de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998).

The trial court failed to read the preliminary jury instructions before testimony commenced. Neither party realized the omission. The trial court subsequently read the instructions during the testimony of the second prosecution witness. This procedure did not comport with the court rules; however, we reject defendant's assertion that the error was structural. This error does not rise to the level of other error, such as the complete denial of counsel or the complete failure to instruct on the elements of an offense, deemed to be structural. See *People v Duncan*, 462 Mich 47, 52-53; 610 NW2d 551 (2000), quoting *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999). The jury received the preliminary instructions, albeit belatedly, and also received instructions prior to beginning deliberations. The jury was not left without the guidance it required to properly evaluate the case. No plain error affecting substantial rights occurred, and reversal is not required. *Carines, supra*; MCL 769.26.

Defendant asserts that this case charged a delivery that allegedly occurred on March 13, 1999, and contends that because the prosecution presented no evidence that he sold narcotics on March 13, 1999, the evidence was insufficient to support the verdict. We disagree.

In reviewing a sufficiency of the evidence question, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). A trier of fact may make reasonable inferences from evidence in the record, but may not make inferences completely unsupported by any direct or circumstantial evidence. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

Defendant was charged in separate files with delivery of less than fifty grams of cocaine. He bases his assertion that the stated offense date in this case was March 13, 1999, on the trial court's docket entries. However, the information on which the defendant was tried lists the same docket number and states that the offense date was on or about March 9, 1999. Defendant was not tried for the delivery offense alleged to have occurred on March 13, 1999. The evidence produced at trial pertained to the sale alleged to have occurred on March 9, 1999, and was sufficient to support the verdict. *Wolfe, supra*.

Defendant argues that trial counsel was ineffective by: (1) failing to make an opening statement; (2) failing to present any evidence; and (3) failing to object to the prosecution's failure to present evidence that a narcotics delivery occurred on March 13, 1999. We disagree.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20. Counsel's deficient performance must have resulted in prejudice. To demonstrate prejudice, defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel is presumed to have afforded effective assistance, and a defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Decisions such as whether to present an opening statement and evidence are presumed to be matters of trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001); *People v Harlan*, 129 Mich App 769, 770; 344 NW2d 300 (1983). We do not substitute our judgment for that of trial counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). There is no indication that defendant was prejudiced by counsel's ultimate decision to waive an opening statement even though she had previously reserved that option. The failure to call witnesses or to present other evidence constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. A substantial defense is one that might have made a difference in the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant has not demonstrated that he was prejudiced in that had defense counsel presented evidence, it is reasonably probable that the result of the proceeding would have been different. *Carbin, supra*. Further, counsel was not required to object to the prosecution's failure to present evidence related to the alleged delivery on March 13, 1999. Defendant was not tried on that charge. Counsel was not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Michael R. Smolenski

/s/ Michael J. Talbot

/s/ Kurtis T. Wilder